

EXHIBIT A

Catherine Hamborg

Subject: RE: FW: legal opinion re Aquatic Application of 2,4-D

-----Original Message-----

From: Erika Schreder [mailto:eschreder@watoxics.org]

Sent: Thursday, May 20, 2004 4:04 PM

To: Patti Goldman

Subject: Fwd: FW: legal opinion re Aquatic Application of 2,4-D

From: "Hamel, Kathy" <kham461@ECY.WA.GOV>

To: Erika Schreder <eschreder@watoxics.org>

Subject: FW: legal opinion re Aquatic Application of 2,4-D

Date: Thu, 20 May 2004 15:55:00 -0700

Hi Erika, According to Kathleen Emmett, I can go ahead and send these to you. This is the entire string of e-mails so you need to start at the bottom and read up.

Kathy

-----Original Message-----

From: Lavigne, Ronald (ATG)

Sent: Wednesday, May 12, 2004 2:48 PM

To: Emmett, Kathleen

Cc: Hamel, Kathy

Subject: RE: legal opinion re Aquatic Application of 2,4-D

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Kathy,

In response to Kathy Hamel's two additional questions.

1) The injunction excludes the use of pesticides for control of state-designated noxious weeds "as administered by public entities[.]" This exclusion does not appear to require that the pesticide application be done by a public entity, but only requires

that the application be "administered" by a public entity. Since Agriculture holds the NPDES permit for noxious weeds, a public entity is administering the application of pesticides even if the actual application is done by a private entity at the request of private lake owners. Consequently, so long as the application of pesticides is done to control state-designated noxious weeds, all three of the examples in Kathy's e-mail below would be consistent with the injunction.

2) I'm not sure what Kathy means by the statement "the amine formulation of 2,4-D is registered for aquatic use in Washington." Pursuant to the injunction, only those chemicals registered by EPA under FIFRA for aquatic application can be used within 15 feet of Salmon Supporting Waters. If EPA has registered the amine formation of 2,4-D under FIFRA for aquatic use in Washington, than the amine formation of 2,4-D may be applied directly into water. However, if some entity other than EPA has registered the amine formation of 2,4-D for aquatic use in Washington, or if EPA's registration was not done pursuant to FIFRA, than the amine formation of 2,4-D cannot be lawfully applied directly into waters.

Hope this helps.

ron

-----Original Message-----

From: Emmett, Kathleen

Sent: Wednesday, May 05, 2004 1:13 PM

To: Lavigne, Ronald (ATG)

Subject: FW: legal opinion re Aquatic Application of 2,4-D

Hi Ron, I hope you're getting out and enjoying this beautiful spring.

Thank you for your opinion on this pesticide/buffer matter. Kathy Hamel in my program had some additional questions (see below) about the use of 2,4-D in areas restricted by Judge Coughenour. Basically she wants to know

1) if applicators who contract with WSDA to treat noxious weeds under their permit coverage are considered agents of WSDA. And

2) does the exemption for treatment of noxious weeds apply to aquatic weeds that are treated in waters, such as Lake Washington.

Thanks, Kathleen

-----Original Message-----

From: Hamel, Kathy

Sent: Tuesday, May 04, 2004 4:20 PM

To: Emmett, Kathleen

Subject: FW: legal opinion re Aquatic Application of 2,4-D

Hi, Here is the e-mail that I sent to Ron on the 22nd.
We really need to get a decision on this ASAP since

applications are being held. If you can speed Ron up, I would really appreciate it. By the way, Bridget Moran does think that private applicators operating under the NPDES permit for noxious weeds can use the amine formulation of 2,4-D for milfoil control.

Kathy

-----Original Message-----

From: Hamel, Kathy

Sent: Thursday, April 22, 2004 11:39 AM

To: Lavigne, Ronald (ATG)

Cc: Peeler, Dave; Carley, Steve; Gildersleeve, Melissa; Emmett, Kathleen

Subject: FW: legal opinion re Aquatic Application of 2,4-D

Hi Ron, Thank you very much for your legal opinion of the Court's injunction order for 2,4-D use. We still have a couple of points that we would like you to clarify for Ecology's Pesticide Working Group.

1. What constitutes a public entity? As you are aware, Agriculture holds the NPDES permit for noxious weeds. Everybody who applies herbicides to water for the control of noxious weeds acquires coverage as a "contractor" to Agriculture under this permit. Does that mean that private applicators who are hired by private lake residents for 2,4-D treatment may be considered public entities because they have coverage for that activity under Agriculture's permit? Or does it mean that if King County, for instance, hired a private applicator to treat water milfoil on a lake, that this treatment would be considered to be by a public entity. The third alternative would be if a staff person from King County treated the lake under Agriculture's permit. This third alternative seems to me to be very clear that a public entity is applying the herbicide. The other alternatives are less clear. Could you please let us know if all of these alternatives apply to this ruling or if not, which ones do not apply.

2. The amine formulation of 2,4-D is registered for aquatic use

in Washington. However, the exemptions that are set out for its use for noxious weed control, all seem to pertain to a terrestrial application that may get into the water. Does this exemption also apply to applications of the amine formulation of 2,4-D that are applied directly into the water such as for the control of Eurasian watermilfoil? Based on the ESU maps posted by Agriculture, it appears that Lake Washington and Lake Sammamish are the only lakes that might be affected by this ruling. although there might be a possible 2,4-D treatment in a slough in the Columbia River.

We would appreciate a quick response since Agriculture is already receiving applications from private applicators for treatments on Lake Washington. Agriculture has been instructed to not issue coverage for 2,4-D use until these questions are resolved.

Thank you very much.

Kathy Hamel

Aquatic Plant Specialist

407-6562

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Kathy,
Sorry for my lengthy delay in getting back to you.
Except as discussed below, Ecology should not continue to allow the aquatic application of 2,4-D, or any of the other pesticides that are identified in the Court's injunction order.

The injunction prohibits the ground application of a listed pesticide within 20 yards of a "salmon supporting stream" and prohibits the aerial application of a listed

pesticide within 100 yards of a "salmon supporting stream." Allowing someone to apply one of the listed pesticides directly to water would violate the court's injunction, since such an application would not comply with either the 20 or 100 yard buffer zone required by the injunction. Consequently, Ecology cannot authorize the application of a listed pesticide unless the application complies with the 20 and 100 yard buffers. This effectively prohibits most aquatic applications of the listed pesticides.

Pursuant to paragraph III.D.2.g of the injunction (pp 9-10), Ecology may authorize the use of the amine formulation of 2,4-D by public entities to control state designated noxious weeds within the 20 and 100 yard buffers that would otherwise apply. If the amine formulation of 2,4-D has been registered by EPA under FIFRA for aquatic application, it can be applied directly to water by a public entity for control of state-designated noxious weeds. Order at paragraph III.D.2.d. If the amine formulation has not been registered by EPA under FIFRA for aquatic application it cannot be applied within 15 feet of salmon supporting waters. Please note that paragraph III.D.2 includes several restrictions that must be observed if the use of the amine formulation of 2,4-D is going to be authorized pursuant to this paragraph of the order. If these restrictions are not included in the noxious weed permit, the permit will need to be modified to include the missing restrictions before the use of the amine formulation of 2,4-D can be authorized by Ecology. Also please note that under paragraph III.D.2 of the order, the amine formulation of 2,4-D can only be used by public entities to control state-designated noxious weeds. If a different formulation of 2,4-D is used, or if the amine formulation is applied by a non-public entity or is applied to control something other than a state-designated noxious weed, than the application will be subject to the 20 and 100 yard buffers discussed above.

I hope this helps. Please don't hesitate to give me a call if you'd like to discuss this further. I'm also happy to meet with you to discuss my opinion if that would be helpful.

ron

-----Original Message-----

From: Emmett, Kathleen

Sent: Tuesday, January 27, 2004 7:29 AM

To: Lavigne, Ronald (ATG)

Cc: Wallace, Dick; Hamel, Kathy; Carley, Steve; Peeler, Dave

Subject: FW: legal opinion re Aquatic Application of 2,4-D

Hi Ron, We need some legal guidance with respect to a ruling by Judge John Coughenour (Seattle DC). He has restricted the use of 38 pesticides near salmon streams, one of which we permit for use under 2 of our NPDES permits. Should we continue to allow the use of 2,4-D? Does this ruling affect the legal coverage provided by our permits?

I've attached the pdfs of our permits, a news release regarding the ruling and a copy of the court order. An email from Kathy Hamel is also attached below.

The spray season starts up in late March early April so it would be wonderful if we could have some guidance on this matter before then. Thanks for your help with this Ron, Kathleen

federal district court Judge John Coughenour has restricted the use of 38 pesticides near salmon streams

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http://www.ecy.wa.gov/programs/wq/pesticides/final_pesticide_permits/n
http://www.ecy.wa.gov/programs/wq/pesticides/final_pesticide_permits/n
---[http://www.earthjustice.org/news/display.html?](http://www.earthjustice.org/news/display.html?ID=767-Original)
[ID=767-Original](http://www.earthjustice.org/news/documents/1-04/Order_1-22-04.pdf)
http://www.earthjustice.org/news/documents/1-04/Order_1-22-04.pdf

Message-----

From: Hamel, Kathy
Sent: Monday, January 26, 2004 3:27 PM
To: Emmett, Kathleen
Cc: Carley, Steve
Subject: Aquatic Application of 2,4-D

Hello,

There are two formulations of 2,4-D that currently are labeled for aquatic use. Ecology allows their use under the NPDES permits for Noxious Weed Control and Nuisance Weed and Algae control. Most of the 2,4-D use under these permits has been for the control of the state-listed noxious weed, Eurasian watermilfoil. 2,4-D is a very selective chemical and very few other aquatic plants are affected by

it at the rates that are allowed. 2,4-D use is subject to Fish and Wildlife timing table restrictions for salmon. Here is the salmon mitigation language used in the noxious weed permit:

The local habitat and/or fish biologist from the Washington State Department of Fish and Wildlife shall be notified at least fourteen days before 2,4-D is applied to salmonid-bearing waters. 2,4-D shall not be applied to a waterbody when, in the

written opinion of the habitat and/or fish biologist, juvenile salmonids would be adversely impacted. The notification requirement will remain in effect until such time that the Washington Department of Fish and Wildlife develops site-specific timing windows for herbicide application. When and if Fish and Wildlife has approved site-specific timing windows, they may be used in lieu of the notification requirement.

Our question is whether the court decision of *Washington Toxics Coalition vs. EPA* and the list of 35 pesticides including 2,4-D (applied terrestrially) has an impact on our aquatic permitting program? Their case was concerned with terrestrially-applied pesticides that are incidentally washing into our streams and rivers after rainfall. In our situation, an aquatic labeled 2,4-D is deliberately applied to a lake for aquatic weed control.

We have already been getting inquiries at Ecology about whether

we will continue to issue permit
coverage for aquatic 2,4-D use.

Thank you.

Kathleen - I assume that you will
attach the court decision to this for
Ron's review.